83-1161

Office - Supreme Court, U.S.
FILED
JAN 14 1984
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

Supreme Court of the United States

January Term, 1984

ROBERT J. MAYLIE, JR.,

Petitioner

v.

NATIONAL RAILROAD PASSENGER CORPORATION
a/k/a AMTRAK,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Joseph Smukler
Attorney for Petitioner
and Counsel of Record
1200 One East Penn Square Bldg.
Philadelphia, PA 19107
(212) 564-1040

Of Counsel:
MEYER, LASCH, HANKIN & POUL

THE LEGAL INTELLIGENCER, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTION PRESENTED FOR REVIEW

Where a trial court has made a finding of fact that the actions of the defendant railroad brought about an atmosphere and environment of constraint in the freely giving of testimony by railroad employees at trial, in violation of Sections 55 and 60 of the Federal Employers' Liability Act, was it error to fail to grant a new trial?

LIST OF ALL PARTIES

All parties appear in the caption of the case in the Court.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
List of All Parties	i
Table of Citations	iv
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Statement of the Case	
A. Summary of Proceedings	3
B. Statement of Facts	3
Reasons for Granting the Writ	7
Appendices	
Appendix A — Order of District Court, March 15, 1982	A-1
Appendix B — Order of District Court, February 8, 1983	A-2
Appendix C — Order of District Court, March 14, 1983	A-3
Appendix D — Order of District Court, May 13, 1983	A-4
Appendix E — Order of District Court, June 8, 1983	A-5
Appendix F — Statement from the Bench in support of Order of February 8, 1983	A-6
Appendix G — Statement from the Bench in support of Order of May 13, 1983	A-18
Appendix H — Judgment Order of Court of Appeals dated September 13, 1983	A-21
Appendix I — Order of Court of Appeals denying Petition for Rehearing dated October 17, 1983	A-22
Appendix J — Federal Employers' Liability Act, Section 1 (45 U.S.C. §51)	A-23

TABLE OF CONTENTS — *(Continued)*

Page

Appendix K — Federal Employers' Liability Act, Section 5 (45 U.S.C. §55) A-23

Appendix L — Federal Employers' Liability Act, Section 10 (45 U.S.C. §60) A-24

Appendix M — Affidavit of Daniel Sinisi dated June 16, 1982 . . . . . A-25

Appendix N — Affidavit of Robert J. Maylie, Jr., dated June 16, 1982 . . . . . A-26

Appendix O — Letter from Robert J. Maylie, Jr. to union representative dated February 12, 1981 . . . . . A-27

Appendix P — Affidavit of Daniel Sinisi dated February 14, 1983 . . . . . A-28

Appendix Q — Form letter forwarded to railroad employees dated February 12, 1981 . . . . . A-36

TABLE OF CITATIONS

Case Citations — Page

Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773 90 L.Ed. 939 (1946) 11

Dugger v. Baltimore & Ohio Railroad Company, 5 F.R.D. 334 (E.D.N.Y.) 9, 11

Hendley v. Central of Georgia R.R. Co., 609 F.2d 1146, rehearing den. 614 F.2d 294, cert. den. 449 U.S. 1093 . . . . . .9, 11

J.I. Case Co v. Borak, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964) 11

Kozar v. Chesapeake and Ohio Railway Company, 320 F.Supp. 335 (W.D. Mich., S.D., 1970) . . . 7, 9, 10, 11

Marbury v. Madison, 1 Cranch 137, 2 L.Ed 60 (1803) . 11

Stack v. Chicago, Milwaukee, St. Paul and Pacific R.R. Co., 615 P.2d 457, 94 Wash.2d 155 (1980) 9, 11

Stark v. Burlington Northern, 538 F.Supp. 1061 (D. Co., 1982) 10, 11

Statutes:

Federal Employers' Liability Act:

Section 1 (45 U.S.C. §51) 2

Section 5 (45 U.S.C. §55) 2, 7, 8, 10

Section 10 (45 U.S.C §60) 2, 7, 8, 9, 10

28 U.S.C. §1254(1) 2

Other Authority:

Senate Rpt. No. 661, 76th Cong., 1st Sess.2,5 (1939) . . 9

No.

IN THE
SUPREME COURT OF THE UNITED STATES

January Term, 1984

ROBERT J. MAYLIE, JR.,

Petitioner

v.

NATIONAL RAILROAD PASSENGER CORPORATION a/k/a AMTRAK,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

There were no written opinions delivered in the courts below. Orders of Court were filed by the United States District Court for the Eastern District of Pennsylvania on March 15, 1982, February 8, 1983, March 14, 1983, May 13, 1983, and June 8, 1983. These Orders appear as Appendices A through E. According to the Orders of February 8, 1983, and May 13, 1983, they were issued for reasons stated from the bench. The statements from the bench in support of the Order of February 8, 1983, appears as Appendix F. The statements from the bench in support of the Order of May 13, 1983, appears as Appendix G.

The Judgment Order of the United States Court of Appeals for the Third Circuit, dated September 13, 1983, appears as Appendix H, and the Order of the Court of Appeals denying the Petition for Rehearing, dated October 17, 1983, appears as Appendix I. None of the Orders were reported.

JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third Circuit was entered on September 13, 1983 (Appendix H) and the Petition for Rehearing was denied by Order entered October 17, 1983. (Appendix I).

The Jurisdiction of the Supreme Court is invoked under 28 U.S.C. Section 1254(1).

The basis for Federal Jurisdiction in the District Court was the Federal Employers' Liability Act (45 U.S.C. §§51-56).

STATUTES INVOLVED

The subject action arose and was determined under the provisions of the Federal Employers' Liability Act (45 U.S.C. §51) which is set forth in Appendix J.

Petitioner claims violation by Respondent of the Federal Employers' Liability Act, 45 U.S.C. §55 and §60, which are set forth in Appendix K and L respectively.

STATEMENT OF THE CASE

A. *Summary of Proceedings*:

This action was instituted by plaintiff Robert J. Maylie, Jr., to recover under the Federal Employers' Liability Act for personal injuries sustained in the course of his employment with the defendant, National Railroad Passenger Corporation, a/k/a AMTRAK. A jury trial was held, and after testimony and charge of the Court, the jury returned a verdict in favor of the defendant on March 15, 1982. The plaintiff timely filed a Motion for a New Trial.

After a hearing on plaintiff's Motion, there were several evidentiary hearings and on February 8, 1983, the Court ordered that the jury verdict in favor of the defendant be set aside and plaintiff's Motion for a new trial be granted. Upon defendant's Motion for Reconsideration, argument was reopened, there were further evidentiary hearings, and on May 17, 1983, the Court vacated the order granting a new trial and reinstated the jury verdict in favor of defendant. Plaintiff's Motion for Reconsideration was denied on June 8, 1983. Plaintiff thereafter timely filed an appeal which was denied on September 13, 1983, and Petition for Rehearing which was denied on October 17, 1983.

B. *Statement of Facts*:

On February 17, 1981 plaintiff was employed by defendant as a machinist helper, and he was ordered by his supervisor to help him empty the contents of a metal open-topped 55 gallon drum into a dumpster. All plaintiff could see located in the top of the drum was trash, bottles, and paper. While lifting the drum with his supervisor there was, unknown to him, liquid in the bottom of the drum which shifted toward plaintiff, his feet then slipped on grease, oil and diesel fuel on the ground in that area (concerning which he had notified defendant) and he injured his back. As a result of this he had a surgical laminectomy and disc excision, and he has been unable to work at all since his injury.

Subsequent to the verdict, plaintiff presented the Court with affidavits from seven employees of the defendant at the Bristol Shop, Bristol, Pennsylvania, where the accident oc-

curred, including two foremen, confirming that the actions of Steve Scott, Supervisor of the Bristol Shops, were such as to threaten, frighten, and coerce employees at that shop from bringing claims under the Federal Employers' Liability Act (hereinafter, the F.E.L.A.), or from testifying in their behalf. Plaintiff also filed the affidavit of Mr. Daniel Sinisi, who had been one of the men who assisted in lifting the drum at or about the time of the accident and who stated:

> I had been asked by Bob Maylie to testify at trial since I was one of the men on the barrel when he got hurt. I told him I did not want to get involved, that I only have five years left to go on Amtrak before I can retire, and knowing the way things are in the shops, I was very afraid to make waves. (Appendix M).

It was only on June 16, 1982, subsequent to trial, that plaintiff was able to get an affidavit from Mr. Sinisi relating to the facts contained therein. Plaintiff filed his own affidavit that prior to trial he had attempted to obtain testimony for use at trial from fellow employees at the Bristol Shop as to the condition at the location where the accident occurred, and:

> They said they don't want to get involved because of the way things were at the Bristol Shops, that if they testified for me there would be holy hell for them at work, that they had to feed their families and they didn't want to lose their jobs. (Appendix N).

This was supported by letter from Maylie to his union representative, dated February 12, 1981, prior to his injury, stating that he, Maylie, had testified for a fellow worker at a trial and that "ever since I have testified for this man — that Steve Scott said that everyone that testified for him — had put one foot in their grave." (Appendix O).

Defendant filed a counter-affidavit from Supervisor Steve Scott denying any harrassment or coercion.

At the end of that testimony on February 4, 1983, the Court granted a new trial, stating:

I concluded that there was an atmosphere of constraint which operated within the Bristol Shop where Mr. Scott had substantial supervisory authority that was generated at least in very large measure by Mr. Scott's remarks to railway personnel, and which led or was likely to have led to at least a number of persons to conclude that it was threatening to their job security to either file claims or support claims growing out of accident in the work situation. (See Appendix F).

The Court also made certain findings of fact relating to that "atmosphere of constraint":

(1) I do, however, conclude that the message which it is common ground that Mr. Scott delivered was one which could, as to some members of the work force, carry with it a sense of very serious caution about the freely giving of testimony in a lawsuit, such as Mr. Maylie's.

(2) I am bound to conclude that I would think it not unreasonable for some employees of lesser stamina and others of perceived vulnerable status to be anxious about being placed in the kind of context that one might be placed in, would be placed in, by a request to testify with respect to an injury claim brought by a member of the Bristol Shop, such as Mr. Maylie's was.

(3) What I do conclude is that in the context of the atmosphere at the Bristol Shops among personnel, who have been so emphatically advised by Mr. Scott of the link between injury claims and the budgetary wholeness of the shops and the implication that that linkage has for hazard to the security of the working at the Bristol Shops.

(4) The trial of Mr. Maylie's suit against Amtrak took place under a constraint that is inappropriate for any Court, it is inappropriate for this Court, and is a constraint that a Federal Court must pay special heed to when the cause of action is Federal in nature, and nurtured by Congress, as claims under the Federal Employers Liability Act have been for three-quarters of a century. (See Appendix F).

The defendant then filed a Motion for Reconsideration appending thereto a second affidavit of Mr. Sinisi. (Appendix P).

On March 14, 1983, the Court granted defendant's Motion to reopen argument and thereafter, on May 12, 1983, after hearing testimony from Mr. Sinisi and Mr. Maylie, the Court vacated its earlier order granting a new trial and entered a judgment on the jury's verdict for the defendant railroad. (Appendix G).

This decision was made despite the finding by the Court that:

> I had concluded earlier in this proceeding and find no reason to retreat from it that there has been within the Bristol Shop from a period prior to and contemporaneous with Mr. Maylie's accident an environment of constraint generated in very considerable part by Mr. Scott's statements that the constraint related particularly to claims against the railroad arising out of accidents and increased costs that this would impose and I have concluded that it was certainly reasonable within that environment for personnel to feel that testimony adverse to the railroad would or at least could lead to some form of reprisal or detriment at Mr. Scott's hands. (Appendix G).

The plaintiff thereafter filed a Motion for Reconsideration, enclosing 341 letters forwarded on December 16, 1978 by Mr. McKinley Scott, Division Engineer, National Railroad Passenger Corporation, to defendant's maintenance of way employees, including the employees at defendant's Bristol Shops, and especially to plaintiff herein and fellow employees (Appendix Q, being one of 341 identical letters). This accusation of unsatisfactory records and threats of disciplinary action contained in these letters without regard to the cause or responsibility for such injuries was an obvious device to prevent defendant's maintenance of way employees, including those at the Bristol Shops, from filing, reporting, pursuing, or assisting others in filing, reporting or pursuing claims for on-duty accidents.

REASONS FOR GRANTING THE WRIT

This Honorable Court should grant a Writ of Certiorari because on an important question of substantive law under the Federal Employers' Liability Act, the United States Court of Appeals for the Third Circuit rendered a decision in conflict with the decisions of other federal and state courts on the same matter. Where, as here, a finding has been made of coercive practices by the defendant which resulted in an environment of constraint in the freely giving of testimony, it was error to fail to grant a new trial.

After the presentation of numerous affidavits and the holding of evidentiary hearings, the District Court had made the findings enumerated on pages 5 & 6 *supra*. (Appendix F).

Sections 55 and 60 of the F.E.L.A. are specifically designed to prevent the actions found by the District Court to have been perpetrated by the defendant.

Plaintiff made numerous attempts prior to trial and during trial to obtain information from fellow employees which could lead to their testifying during the pendency of the trial. (Appendix M; Appendix N). Plaintiff was met with refusal based on fear of harassment or reprisal by the superintendent of the Shop.

The problem of a plaintiff such as Mr. Maylie is best spelled out by the court in *Kozar v. Chesapeake and Ohio Railway Company*, 320 F.Supp. 335, at page 368 (W.D. Mich., S.D., 1970), rev'd on other grounds:

> Experience with Federal Employers' Liability Act cases has carried with it many lessons. One is that the bulk of testimony usually comes from employees of the defendant, thus rendering advisable the sequestration of witnesses in order to preserve intact their individual recollection of facts and events. Another, more painful, reality is that these witnesses — a railroad's own employees — often appear fearful to testify. This obvious anxiety is not merely the product of a shy or nervous personality, *it is the kind of fear that comes from the belief that one's words may affect job, financial security, family and future*.

The court goes on to say, at page 369:

> . . . railroad employees are subject to considerable pressure if called to give testimony against their employer. This pressure need not be the result of direct threats or armtwisting; it is not necessarily the object of deliberate railroad policy. But whether by design or accident, the fact remains that these working men, through numerous contacts with supervisors and claim agents during the discovery process, often believe that a wrong step — defined by railroad rules (real or apparent) and interpreted by railroad officials — may result in sanctions, and that the wrong testimony — potentially costing the railroad large amounts of money — might arouse the displeasure of those in control of their livelihood. The tremendous power of a corporation like the Chesapeake and Ohio Railroad, coupled with its aggressive efforts to defeat the claims of those injured by its activities — even when the victims are their most valuable employees — can overawe and even cower those individuals upon whom an opposing party must rely to substantiate his claim. Defendant's attempt to minimize these pressures by claiming inability, in the face of the railroad unions, to sanction its employees is not convincing. No one in the position of these men can be expected to take a position opposing their employer without considerable anxiety. This is a fact of human nature which defendant cannot so cavalierly ignore.

The words of the Court below expressed the underlying anxiety and fear, but the reason the plaintiff had no other witness testimony was not only because of the underlying fear referred to above by the court, but also because of the actions of defendant as found to exist by the District Court.

The authors of the F.E.L.A. understood that to permit tactics such as these would be abhorrent and in order to insure uninhibited exercise of the rights granted by the F.E.L.A., they included in the statute the provisions of §55 and §60. These were designed to protect the federally created rights.

As stated in *Kozar*, *supra*, at page 385:

> To the extent coercive tactics are used by railroads against their injured employees to discourage resort to Federal Employers' Liability Act litigation, the result is an impermissible chill on rights created by Congress, and which as matter of public policy and natural law inheres in each employee as a human being. Any chilling effect can be expected to extend not only to prospective Federal Employers' Liability Act plaintiffs, but to all employees and their families, it could be expected to prevent unfavorable testimony as well as the filing of lawsuits. This result is intolerable.

The defendant having been found to have violated the rights of Mr. Maylie, by the actions of its Supervisor, Steve Scott, the verdict should not be permitted to stand. This Honorable Court has the responsibility to prevent such a blatant injustice. The failure to grant a new trial was improper as a matter of law.

The Statute, 45 U.S.C. §60, provides that any device is *void* that is intended or has the effect of preventing employees of a common carrier from voluntarily furnishing information to a person in interest as to the facts incident to the injury or death of an employee. *Hendley v. Central of Georgia R.R. Co.*, 609 F.2d 1146, rehearing den. 614 F.2d 294, cert. den. 449 U.S. 1093.

As stated in *Dugger v. Baltimore and Ohio Railroad Company*, 5 F.R.D. 334 (E.D.N.Y.), "It was the intent of Congress to see to it that an injured employee could readily obtain all the available information from witnesses, particularly employees of the railroad company.

The intent of this section was to attempt to equalize the access to information available to the highly efficient claim departments of the railroads and to the individual F.E.L.A. claimants, and to prohibit actions which would inhibit the free flow of information to clients. See Senate Report No. 661, 76th Congress, 1st Sess. 2, 5 (1939).

In *Stack v. Chicago, Milwaukee, St. Paul and Pacific R.R. Co.*, 615 P.2d 457, 94 Wash.2d 155 (1980), the court stated:

We also note Section 60 of the FELA prohibits any devices which has the *effect* of inhibiting the voluntary furnishing of information by an employee. Thus it is apparent Section 60 focuses on the result of employer action, not on the precise nature of the conduct itself. Rather than unduly restrict the scope of Section 60, we interpret it to prohibit *any* action by an employer which effectively restricts employee information as to the facts incident to an employee's injury or death.

In *Stark v. Burlington Northern*, 538 F.Supp. 1061 (D. Co., 1982), the court stated:

> The broad prohibition by threat, intimidation, order, rule, contract, regulation or device, indicates that §60 was designed to prevent any direct or *indirect* chill on the activity of information to any party in interest in an FELA claim. Therefore, the act is to be read liberally.

Speaking of what the court should do when it detects coercive tactics in violation of §55 and §60, the court in *Kozar*, *supra*, at pages 385 to 386, stated:

> Any such situation that comes before this Court will receive the closest attention. Every remedial weapon (including contempt) will be available to insure uninhibited exercise of federal rights. To the extent allowed by law, other agencies of government will be advised and requested to take appropriate action. These practices to the extent they exist and are detected, will not be allowed to continue.

The remedies granted are not limited to the criminal process but the greatest latitude of equitable and other relief. As stated in *Kozar*, *supra*, on page 370 at Footnote 17:

> Obviously, any direct attempt by the Chesapeake and Ohio Railroad to prevent employees from giving statements or conferring with opposing attorneys would be in violation of this section. Such a violation of federally created rights can be remedied not only through the criminal process but in an action for equitable or other relief. It has been clear

since *Marbury v. Madison*, supra, that the logic of the common law of remedies and the equitable power of the Court combine to allow maximum flexibility in adjusting the quality of remedy to the nature of the right involved. *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946); *J. I. Case Co. v. Borak*, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964).

Despite the finding of coercive practices by the defendant, the court did nothing to insure the unhibited exercise of Mr. Maylie's rights.

Plaintiff is unaware of a single case where a determination has been made by a court that there was a restraint on the uninhibited exercise of federal rights and where it permitted the perpetrator of such acts of emerge the victor in the unequal contest.

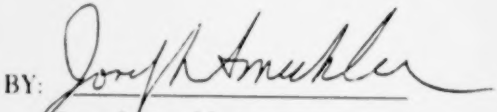
In *Kozar*, *Stark*, *Hendley*, *Stack*, and *Dugger*, *supra*, each of the courts where a constraint was found to exist granted an appropriate remedy to protect the F.E.L.A. process from infringement by the carrier.

Having once found the constraint to exist, the court has placed on the plaintiff the impossible burden of proving that this affected the trial of his case. If there is a constraint, as the trial court indeed found there to be in this case, no one can be expected to come forward voluntarily and speak up. The court in essence has found that such constraint is permissible and hence not the basis of a new trial so long as the plaintiff cannot meet the almost impossible task of learning of a witness who might have knowledge of facts and refused to come forward because of the threat. How can a plaintiff know whether others are possible witnesses or not, given the "atmosphere of constraint"? It must be remembered that evidence is clear that all the events occurred in a relatively small railroad shop with approximately one hundred employees and in which very little occurs which is not known.

The plaintiff made every effort to secure witnesses for trial on the issue of the unsafe ground conditions. The prevailing attitude of prospective witnesses was: "No way, I don't want to get involved in any of that. I am not losing my job for nobody". (Appendix N).

Here the trial court found the constraint, yet the courts below intolerably allow the carrier, which was found by the trial court to have violated the statute, to go unscathed and Mr. Maylie to bear the surgical scars, unrecompensed. This is contrary to the decisions of the federal and state courts cited herein and for this reason it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

BY: 

Joseph Smukler
Counsel of Record and
Attorney for Petitioner

Of Counsel:

MEYER, LASCH, HANKIN & POUL
1200 One East Penn Square Bldg.
Philadelphia, PA 19107

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT J. MAYLIE, JR.	:	Civil Action
	:	
v.	:	
	:	
NATIONAL PASSENGER RAILROAD CORP., a/k/a AMTRAK	:	No. 81-1964

CIVIL JUDGMENT

Before POLLAK, *J.*:

AND NOW, this 15th day of March 1982, in accordance with the jury's answers to interrogatories and the direction of the Court,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of Defendant, National Passenger Railroad Corporation, aka AMTRAK, and against Plaintiff, Robert J. Maylie, Jr., together with costs.

BY THE COURT:

ATTEST: AMELIA FEARS
Deputy Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT J. MAYLIE, JR.	:	Civil Action
	:	
v.	:	
	:	
NATIONAL RAILROAD PASSENGER CORPORATION, a/k/a AMTRAK	:	No. 81-1964

ORDER

For the reasons stated from the bench of February 4, 1983, it is ORDERED that the jury verdict in favor of defendant is hereby SET ASIDE and plaintiff's motion for a new trial is GRANTED.

February 8, 1983.

POLLAK, *J.*

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT J. MAYLIE, JR.	:	Civil Action
	:	
v.	:	
	:	
NATIONAL RAILROAD PASSENGER CORPORATION	:	No. 81-1964

ORDER

Upon consideration of defendant's motion for reconsideration, and plaintiff's response thereto, it is hereby ORDERED that defendant's motion to reopen argument is GRANTED. A hearing in this matter will be held in Courtroom 13B on Friday, March 25, 1983, at 10:00 A.M. Counsel are requested to have Mr. Daniel Sinisi present at that hearing to testify.

March 14, 1983

POLLAK, *J.*

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT J. MAYLIE, JR.	:	Civil Action
	:	
v.	:	
	:	
NATIONAL RAILROAD PASSENGER CORPORATION, a/k/a AMTRAK	:	No. 81-1964

ORDER

For the reasons stated from the bench on May 5 and on May 12, 1983, it is hereby ORDERED that the Order of February 8, 1983 granting plaintiff's motion for a new trial is VACATED and that the jury verdict in favor of defendant and against plaintiff is reinstated.

May 13, 1983

POLLAK, *J.*

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT J. MAYLIE, JR.	:	Civil Action
	:	
v.	:	
	:	
NATIONAL RAILROAD PASSENGER CORPORATION, a/k/a AMTRAK	:	No. 81-1964

ORDER

Upon consideration of plaintiff's motion for reconsideration, and defendant's response thereto, it is hereby ORDERED that plaintiff's motion is DENIED.

June 8, 1983

POLLAK, *J.*

APPENDIX F

CLOSING ARGUMENTS OF COUNSEL AND DECISION OF THE HONORABLE LOUIS H. POLLAK

MR. SMUKLER: I would just make one statement, if I may on this. I'm sure that on this issue, at least, the question is not someone meeting the burden of proof of whether it's believed or not believed as to what the men thought. What we are talking about here is what this gentleman did, what Mr. Scott did. Did it so act upon the men so that any of the men were chilled because of what he said from coming forward to testify? So the only point I want to make is I don't think we are talking about meeting the burden of proof whether it's more likely or less.

The question is did his actions make it so that individuals felt harassed and fearful of coming forward with testimony in this case. I just wanted to make that statement. I think it's important, what I'm trying to say, at least, on this one issue.

JUDGE POLLAK: I understand.

Mr. Goerwitz.

MR. GOERWITZ: No. I think on the contrary. What, basically, he is charging is a criminal violation. I think the issue here really for the Court is the Plaintiff's burden in this matter of showing what nefariousness was done. I think all he's managed to show is, first of all, there are some disgruntled number of people, that is, quite a number of people who don't like Scott. That Maylie approached them about taking their affidavits to get Steve Scott's job and, as a matter of fact, in any event, none of this would have really mattered.

No one here has testified or indicated to the Court in any way their presence would have affected this trial in any manner. Gibson was the only witness they approached. He was properly refused to testify by the Court. And there really hasn't been anything else. He wasn't called here, as a matter of fact.

Another witness, there was some indication in the affidavit, may have known something from the indication — there was an indication that he probably would have known. There was no indication that he was ever approached by the Plaintiff until afterwards for an affidavit. There is no indication that his testimony

was as a result of a conscious act on the part of the Defendant.

MR. SMUKLER: When the Defendant says, "the conscious act on the part of the Defendant," I would just point out to Your Honor the Kozar case and extensive discussion in that. The real question is were coercive tactics used. I don't think they have to be intentional.

If a man is standing in front of the boss of the shop and the boss says to him — and we are getting close to that even from Mr. Scott — if there were accidents at this shop and if we have to pay money, that money is going to come out of this shop and this can affect jobs.

Questions. Some said he said jobs. Some said he said monies in the job. That that's going to affect you. It is going to affect the money we have for the shop. Questionable jobs. We have evidence it was jobs. He said it wasn't jobs. What is a man supposed to do?

A man finds himself in a position where he certainly feels that he should not come forward and there is a great reluctance to come forward. It was very difficult to get people to come forward in this case at all. No one likes to come in and talk in front of the boss whom they may be working for. That's what happened here. And I think that the words in Kozar that there was a chilling effect, and, if there is a chilling effect on any employees who might have testified — and it doesn't have to be all of them, and it doesn't have to be the ones that the Defendant brought in — if there is a chilling effect, that affects the Plaintiff's rights.

And I think this Court has the duty, if it feels that there was such a chilling effect on other employees and this employee, to give the remedy that Kozar talks about which is equitable remedies. It's not only criminal remedies. It is equitable remedies to see that justice is done.

That's our argument.

JUDGE POLLAK: This hearing has covered a pretty wide range of activity, only a small portion of which perhaps is central to our inquiry.

We have an affidavit from one person, Mr. Sinisi, who says he declined Mr. Maylie's request that he appear as a witness because of his essential concern for maintaining his own status quo

in the few years before retirement. I think he's the only affiant who has asserted that he didn't take some course of action that would have led him to be a witness in Mr. Maylie's lawsuit.

MR. SMUKLER: I think that's true.

JUDGE POLLAK: That's your recollection.

Is it also your recollection, Mr. Goerwitz?

MR. GOERWITZ: Yes, sir.

JUDGE POLLAK: With respect to Mr. Sinisi, I take it to be the Railroad's position that, (a), it isn't new evidence in the sense that he was known about pretrial; and, (b), it's not very significant testimony that he was prepared to give or, to be more precise, was not prepared to give. Mr. Sinisi does not say that Mr. Scott frightened him out of testifying or, indeed, that any particular person did.

MR. SMUKLER: I think that's true. He did not mention Mr. Scott to my recollection.

JUDGE POLLAK: What he said exactly was, "I have been asked by Bob Maylie to testify at his trial since I was one of the men on the barrel when he got hurt. I told him that I did not want to get involved. That I only have five years left to go on Amtrak before I can retire and, knowing the way things are in the shop, I was very afraid to make waves."

That's not addressed to Mr. Scott or any other particular person in management or otherwise.

The range of other claims, that Mr. Scott was oppressive, coercive, harassed those under him, either disciplined people or threatened them with discipline for activity adverse to what Mr. Scott perceived as the interest of Bristol Shops, including testifying on behalf of others who file claims or were the subject of disciplinary proceedings, that range of allegations I regard as for the most part beyond anything that I need to resolve for our present purposes.

What I think I have to focus on is whether there is some substantial ground to think that Mr. Sinisi is telling the truth. In effect, saying I would have come forward to be a witness but I was anxious about what that would do to my own status. That's an inquiry that doesn't go to the question, assuming the answer is yes. Mr. Sinisi could reasonably have had such an anxiety. It

doesn't go to the question whether, in fact, anything bad would have happened to Mr. Sinisi.

The concern that I think has to be pursued is whether a trial on a Federal cause of action has been subjected at a proved stage to some constraint which was untoward in that evidence for one party or for the other was less full than it might have been because a witness felt in fear.

Now, it's in that perspective that I have been reviewing these affidavits and listening to the witnesses.

Clearly, Mr. Scott is a controversial figure. I hope, Mr. Scott, you will at least accept that finding of fact. There are a number of witnesses who think very highly of Mr. Scott and it's most evident from Mr. Scott's rapid rise at Amtrak that he must be a person of very considerable ability.

It's also evident that there are a number of people who do work or have worked at Amtrak who are not among Mr. Scott's great admirers. I will acknowledge that some of the people who, at least from the witness stand, liked Mr. Scott the least or have given the least flattering profile of him are people that I do not find very compelling. I do not find myself overwhelmed by confidence in what Mr. Cappecci had to say, what Mr Boeta had to say, what Mr. Wilks had to say. Indeed, I guess with Mr. Capecci it was about all that we collectively could do to get some testimony out of him. However, I don't regard it as my function to be conducting a popularity contest among witnesses. What I do distill out of the testimony which I think is clearly credible is this. Mr. Scott himself has told us that he pointed out to the members of the shop that injuries cost money to the budget of the Bristol Shops. And that a blow to the budget of the Bristol Shops is something that raises questions as to how it conducts its operations.

I'm not pretending that these are Mr. Scott's words; but, in substance, I understood Mr. Scott to have been acknowledging that was a message that he communicated to his people as part of an effort to instill safety lessons in them. Mr. Scott quite vigorously denied saying that he had said anything to the effect that the burden on the budget of Bristol Shops caused by injuries could reflect itself in layoffs.

Now, several witnesses testified to hearing Mr. Scott speaking at a meeting of the shop personnel and delivering a message which sounds very much like the message which Mr. Scott himself recalls having conveyed. I find that all our talking about at least one common meeting on the steps adjacent to Mr. Scott's office, there may well have been more than one such occasion, but it seems to me clear that there was at least one. There are variations in the reporting as to just how far Mr. Scott did go in delivering his message. We have Mr. Cunha and Mr. Leach explicitly drawing a connection between the cost to the Bristol Shops of recoveries by personnel for injuries and lay-offs.

Mr. Leach went further contributing to Mr. Scott's statement by helping them, that is to say, claimants for injuries, you are hurting yourself. By my recollection of the witnesses today we have substantial confirmation of Mr. Cunha's understanding of Mr. Scott's words.

From Mr. Ketterer and, perhaps, from Mr. Romano, neither Mr. Ketterer nor Mr. Romano committed themselves to a particular form of words. Mr. Ketterer did seem to recall a linking of reduced budgets at the work shop, at the shop, to possible lay-offs. Mr. Romano seemed in general to accept a formulation pretty much like Mr. Cunha's recital, but did not come to rest on a particular form of words.

Mr. Frankenfield did recall some linking of losses due to injuries with an impact on the budget. Frederick Kiernan recalled Mr. Scott saying we have to really come to grips with this accident problem.

It seems to have been an agreement that Mr. Scott was talking in the context of what has been characterized as a rash of accidents. But Mr. Kiernan had no recollection about any connection with the budget.

Out of this I draw the conclusion that Mr. Scott spoke emphatically about the threat to the physical integrity of the work shops, of the Bristol Shops, due to the claims which were likely to arise from injuries, and gave the impression to his listeners whom he had gathered together to give this message to that a threat to the Bristol Shops' budget might have deleterious consequences for collective interest of those working there.

I don't think I can confidently make a finding that Mr. Scott did say lay-offs may follow. I certainly don't think I can confidently make a finding that he did not say that lay-offs will follow. Nor do I feel that I can confidently make a finding one way or another as to Mr. Scott's having gone on to say, as Mr. Leach says he said, if you help those people, you are hurting yourselves. It seems to me entirely possible that Mr. Scott spoke more emphatically than he now recollects. He clearly meant to give them a significant message to his listeners.

The weight of that message is clear from the fact that upwards of two years later several persons, including detractors of Mr. Scott, to be sure, or persons who perceive themselves in an adversary relationship to Mr. Scott, as Mr. Cunha does, but also including persons, such as Mr. Ketterer and Mr. Romano, who plainly think very highly of Mr. Scott, all remember this forceful talk. All received the lesson that Bristol Shops might well be adversely affected in a way that personnel should take serious note of by further injury claims.

Now, we have heard testimony from some people who, as I have made plain, I find of marginal reliability: Wilks, Cappecci, Boeta, about reprisal carried out by Mr. Scott or threatened by Mr. Scott or those working under him for persons somehow perceived as hostile to the good interests of the Bristol Shops, whether through breaches of discipline or safety violations or testimony in support of personnel involved in one or another of those activities, or both.

We have heard much testimony from numbers of persons who said that not only did they themselves not suffer any such adversity, although some of them have been injured and filed claims, others have been subject to discipline or whatever; but they knew of no such activity or attitude on Mr. Scott's part. I certainly do not feel on the basis of the record before me that there is a ground for concluding that Mr. Scott has been and is now the kind of supervisor that carries out such vindictive and really lawless behavior as disciplining employees for the pursuit of their rights or the proper support of fellow employees.

I find no basis for attributing that kind of activity to Mr. Scott. I do, however, conclude that the message which it is com-

mon ground that Mr. Scott delivered was one which could, as to some members of the work force, carry with it a sense of very serious caution about the freely giving testimony in a lawsuit, such as Mr. Maylie's.

Though it is quite plain to me that many stalwart persons wouldn't be deterred at all, have indeed filed claims and gave testimony, I am bound to conclude that I would think it not unreasonable for some employees of lesser stamina and others of perceived vulnerable status to be anxious about being placed in the kind of context that one might be placed in, would be placed in, by a request to testify in an injury with respect to an injury claim brought by a member of the Bristol Shop, such as Mr. Maylie was.

Now, all this comes to a focus in my mind with Mr. Sinisi. We have Mr. Sinisi's uncontradicted affidavit from which I have already read. Confirmation that he was approached by Mr. Maylie and that he declined Mr. Maylie's request that he testify comes from Mr. Cunha who heard Mr. Maylie approach several people, one of them was Mr. Sinisi, and heard Mr. Sinisi say I would rather not get involved. Now, whether Mr. Sinisi's testimony would be significant or not in enlarging the present record, that is the present trial record, I don't find easy to assess. I think there are persuasive reasons for saying that Mr. Sinisi's additional testimony would have been merely cumulative.

Mr. Maylie testified to the events which led to his injury. Mr. Warden was a witness and, if the only issue before this Court were the discovery of a Mr. Sinisi who was out there but simply wasn't identified in time for trial and who now wishes to come forward to testify as to his observations, the events of Mr. Maylie's accident and of the physical environment, the ground contours and so forth, I think I would probably conclude that the additional testimony was not of such consequence as to raise a serious likelihood that it would have affected the jury's decision.

But the problems I tried to suggest at the beginning of my remarks doesn't seem to me to be limited in that way. What I conclude we have here is that Mr. Sinisi did not testify at the trial out of anxiety about what such activity on his part might lead to. I have no basis for measuring Mr. Sinisi's stamina; but,

by his own representation, he is close to retirement and it is fair to attribute to him also it's a very compelling reason not to take actions which would possibly lead to the erosion of what clearly is his major asset, his expectation of retirement benefits, and in good order, and staying employed until retirement comes about.

I repeat that I do not find a basis for saying that anything maligned would have happened to Mr. Sinisi had he come forward to testify. Indeed, my confident expectation is that nothing would have happened except that he would have been subjected to the pitiless and very likely effective cross-examination of Mr. Georwitz. But that certainly nothing would have happened to him affecting his career in any adverse sense.

What I do conclude is that in the context of the atmosphere at the Bristol Shops among personnel, who have been so emphatically advised by Mr. Scott, of the link between injury claims and the budgetary wholeness of the shops and the implication that that linkage has for hazard to the security of those working at the Bristol Shops.

In that context I think it is a reasonable conclusion, and it is my reasonable conclusion, that Mr. Sinisi could have understandably felt that it was not in his interests to be a witness on Mr. Maylie's behalf. That conclusion leads me to the further conclusion that *the trial of Mr. Maylie's suit against Amtrak took place under a constraint that is inappropriate for any Court, it is inappropriate for this Court, and is a constraint that a Federal Court must pay special heed to when the cause of action is Federal in nature, and nurtured by Congress, as claims under the Federal Employers Liability Act have been for three-quarters of a century.* (Emphasis supplied).

The Kozar case referred to in Mr. Smukler's submission and part of the line of discussion among counsel and with the Court gives strong emphasis to what the Federal interest is in avoiding any kind of constraining impact on the proper presentation of Federal claims. But, in referring to Kozar, which is 320 Fed. Supp. 335, I want to make it as clear as I can that I am not purporting to make any findings here in this context that go in any way beyond the findings that I have identified. Findings

that come to focus in what I perceive may have been the reasonable, even if from a predictive sense, unwarranted anxiety that led Mr. Sinisi, according to his own affidavit, not to come forward on Mr. Maylie's behalf. I regard it as sufficient for me to bring all of the matters that have been addressed in this rather extended hearing to a focus as they relate to Mr. Sinisi's nontestimony and the occasion for it.

For these reasons I have concluded that the judgment in Amtrak's favor and against Mr. Maylie which was entered pursuant to the jury's verdict should be set aside and a new trial had. And I will enter an order of which, for the reasons that I have undertaken to outline from the Bench, accomplished that.

MR. GOERWITZ: Could I say something?

JUDGE POLLAK: Yes, indeed.

MR. GOERWITZ: I must have misunderstood the Court. I thought the Court had this evidentiary hearing but the Court did not want to make a determination of this seriousness based on simple, unsupported affidavits. The Court has now relied principally on just that in deciding this.

I understood Mr. Smukler was going to bring these witnesses in for cross-examination. We have the Court now relying upon the affidavit of a witness who was not brought in, whose absence was totally unexplained, who, as far as I know, has been available at each hearing date. I would ask the Court at least leave to bring Mr. Sinisi in. I had assumed Mr. Smukler was going to bring in those people that were important. The one witness the Court relies on, he didn't bring in. Now the Court is making a decision in that, (a), he was intimidated by Steve Scott, and (b), his testimony would be relevant and pertinent.

Could we subpoena him and bring him in, Your Honor, before this, I think, rather serious determination is made on the basis of an affidavit?

JUDGE POLLAK: Mr. Goerwitz, Mr. Sinisi's affidavit has been part of this record. I think its purport was plain. We have confirmation from another witness that he heard a conversation between Mr. Sinisi and the plaintiff Mr. Maylie.

MR. GOERWITZ: That was after the trial, though, Your Honor.

JUDGE POLLAK: However that may be, I don't think from the perspective of the determination I was making that it's necessary to have Mr. Sinisi. Obviously, I would not have objected had he been brought forward as a witness, but I certainly supposed his affidavit for what it said was part of the record in this case. Maybe I'm missing something here.

MR. GOERWITZ: I was misled, Your Honor. It was perhaps my fault. I thought the purpose of these hearings was because the Court did not wish to rely on mere affidavits.

JUDGE POLLAK: I did not wish to rely on affidavits to address what seemed to be a strongly mounted set of charges which, at their farthest edge, kind of went to the integrity of the processes governing the Bristol Shops. I think I have made it plain that I do not find a basis for concluding that the coercion, the malign activity attributed to Mr. Scott, abusing his responsibilities, was sustained. But what I hoped this hearing would help me establish, I'm not setting myself up as some far-reaching Grand Jury with figuring how to administer the Bristol Shops, was a far narrower issue.

As certainly as the hearing came into focus and as it became plainer and plainer that I shouldn't be policing the whole issue. Far narrower when an affiant says that he was afraid to make waves or whatever the formula was that Mr. Sinisi used, there was a context within which that was said that was comprehensible. And I have concluded from the testimony of the witnesses I have heard as I do not think I could have confidently concluded on the basis simply of affidavits and cross-affidavits, had you submitted them, that that environment was there.

Now, Mr. Sinisi did not assert in his affidavit that Mr. Scott had threatened him in any way, nor did he even say that he was present at the meeting to which there has been so very much reference to which Mr. Scott testified and Mr. Cunha and Mr. Leach and Mr. Ketterer and Mr. Romano and Mr. Frankenfield. Even Mr. Kiernan. And I have not in my determination this afternoon made any finding that Mr. Sinisi had ever been told anything directly by Mr. Scott in an apparent conversation, or even that he was present when this general statement

was made. So I have not thought for the purposes of the findings I was making that I needed to examine Mr. Sinisi himself.

As I say, I wouldn't have been adverse to hearing him if you or Mr. Smukler wanted to bring him forward.

MR. GOERWITZ: I wasn't the one bringing forward this issue. I thought Mr. Smukler would call him. We will try this case and Mr. Sinisi says I don't know very much about this and we have tried this case all over again. I think there has to be some testimony that his testimony would be significant in the outcome and there is none.

JUDGE POLLAK: Obviously, it's not detailed, but he is apparently prepared to give testimony as to what happened in the lifting of this very heavy vessel and also testimony as to the unevenness of the ground on which various people were working, including Mr. Maylie, Mr. Warden and himself, Mr. Sinisi.

MR. GOERWITZ: May all be true. May not be. What I'm saying, you are making a determination to try the case all over again without knowing it. That is a sine qua non.

JUDGE POLLAK: I think that much I find set out in Mr. Sinisi's affidavit. And, as I say, if that were all simply presented as "newly discovered evidence" in a context in which there was no ground for thinking that there was any inappropriate constraint — I mean inappropriate in the received sense, not anything that was done to Mr. Sinisi — I do not find that was a ground for setting a trial aside. But in this context that we have this matter presented, I mean received, that it's an appropriate exercise of my discretion to direct a new trial.

MR. GOERWITZ: I would think, Judge, if this constraint existed, when Mr. Maylie asked the witness to testify, he would have told Mr. Smukler and Mr. Smukler should have brought that out here, not wait till after the verdict when he loses — I'm sorry.

JUDGE POLLAK: I appreciate your disagreement with my ruling. I will enter an order to that effect.

MR. SMUKLER: Thank you, Your Honor.

CERTIFICATE

I hereby certify that the proceedings, evidence and objections noted, are contained fully and accurately in the notes taken by me on the hearing in this matter; and that this is a correct transcript of the same.

AREA-WIDE FEDERAL REPORTING, INC.

By: _____

Loretta Melling

STATEMENT FROM THE BENCH
In Support of Order of May 13, 1983

APPENDIX G

THE COURT: I'm gratified to have heard from Mr. Sinisy and also to have heard again from Mr. Maylie. In hearing from Mr. Sinisy, I was undertaking at Mr. Shestack's suggestion with a view to confirming or rebutting the inferences that I have drawn from his affidavits and his deposition. I was undertaking to focus on the question which seemed to me and continues to seem to me critical, namely, whether Mr. Sinisy's acknowledged wish not to get involved through testimony was a reflection of fear that something detrimental would happen to his job status including his anticipated retirement and the benefits connected therewith. I had concluded earlier in this proceeding and find no reason to retreat from it that there has been within the Bristol Shop from a period prior to and contemporaneous with Mr. Maylie's accident an environment of constraint generated in very considerable part by Mr. Scott's statements that the constraint related particularly to claims against the railroad arising out of accidents and increased costs that this would impose and I have concluded that it was certainly reasonable within that environment for personnel to feel that testimony adverse to the railroad would or at least could lead to some form of reprisal or detriment at Mr. Scott's hands.

Paralleling, that, I concluded that I had no ground for supposing that that would in fact have happened but only that personnel might reasonably have supposed something of that sort might have followed but I felt and continue to feel that the particular question before me was whether Mr. Sinisy was a person who would have refrained from testifying out of such fear. I expressed the view earlier and I continue to add here to the view that one may well have a spectrum of personnel some of stronger fiber than others and the issue for me was how about Mr. Sinisy. Was his desire not to be involved one that derived from this sense of fear that some might have had that testifying for Maylie would be or could be detrimental to their own individual interests in their job and job related benefits?

I concluded last week on the basis of the affidavits and de-

position and after substantial argument that I could not so find with respect to Mr. Sinisy; that he had expressed himself as not wishing to be involved quite clearly but had not said that it was out of fear of Mr. Scott or for his job situation and indeed had in his deposition expressly denied that. I have now heard Mr. Sinisy. I have questioned him and I have listened to the questions put to him by Mr. Shestack and I remain persuaded that the inferences I drew last week were the proper ones.

Mr. Sinisy has reaffirmed that he did not then wish to be involved and that he so made plain to Mr. Maylie and has continued so to do. Mr. Sinisy has testified today consistently with his deposition testimony that he advised Mr. Maylie that if it were absolutely necessary, he would testify. He has testified today that he felt that he should testify under subpoena, not as a volunteer. Mr. Maylie in his testimony today recounts much of what Mr. Sinisy has said about not wanting to be involved and indeed recalls Mr. Sinisy saying to him, Mr. Maylie, essentially the things that were said by Mr. Sinisy in his first affidavit about his five years left on the job and his wish not to make waves, his determination not to make waves. Mr. Maylie has not in his testimony recalled Mr. Sinisy's statement that he, Mr. Sinisy, would if — Mr. Maylie has not denied such may have been said by Mr. Maylie.

I find no reason to — There is in effect no square conflict of testimony here. I can understandably conclude that Mr. Maylie drew the inference which was explicitly supported that Mr. Sinisy did not wish to testify but I see no reason to discredit Mr. Sinisy's statement under oath today and before Judge Hall that he did acknowledge that he would testify if it were absolutely necessary.

Mr. Sinisy's statement that his testimony would have been unnecessary, wouldn't have added anything was, of course, an observation which may have seemed to have been a matter of common sense but obviously was no substitute for a lawyer's perception, most particularly Mr. Smukler's perception as to what would have added to the trial.

At all events, the short of it is that I find no reason to change my conclusion that Mr. Sinisy whom I have listened to and observed has been telling the truth in saying that he is nondesired

to be involved though clearly it reflected a disinclination to get into an adversary relationship with his employer on a voluntary basis was not grounded in a fear that if he did testify most especially under the compulsion of a subpoena that something malign would happen to him in his job situation. He has repeated clearly that he did not so fear and that he remains ready to speak truthfully throughout. I find no reason to disbelieve him and so I reaffirm my conclusion announced last week but essentially put into suspense on the basis of Mr. Shestack's request that I hear from Mr. Sinisy in person; that I have no proper basis for directing a new trial for the purpose of including the testimony of Mr. Sinisy and, therefore, I will now enter an order vacating my earlier decision directing a new trial and entering a judgment on the jury's verdict for the defendant railroad.

I thank you all.

(The plaintiff 's wife raised her hand.)

THE COURT: Mrs. Maylie —

THE PLAINTIFF'S WIFE: You haven't read them letters that was sent to them and there were 25 letters that were in my pocketbook. They were dated before my husband's injury and I don't — Mr. Sinisy wasn't one of the men who wrote that letter. If you'll read those letters, there was a lot of men in that shop. You could read them letters and it was said it was fear and harassment in that.

THE COURT: Mrs. Maylie, I have no reason to doubt that those letters say what you say they did. I have already come to the conclusion and I think I mentioned it a few minutes ago that there was an atmosphere of constraint within which railroad personnel could be expected, some of them to be in fear and I said against that background that the question for me was was Mr. Sinisy within that group. I didn't read these letters that Mr. Smukler has put into the record because they only go to the very point that I've already found to be true, this atmosphere of constraint and fear and so they don't add anything to a determination that I've already made.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1412

ROBERT J. MAYLIE, JR.,

Appellant

v.

NATIONAL PASSENGER RAILROAD
CORPORATION a/k/a AMTRAK
(Civil No. 81-1964 — E.D.Pa.)
District Judge: Honorable Louis H. Pollak

Submitted Under Third Circuit Rule 12(6)
September 13, 1983
Before: SEITZ, *Chief Judge*, GIBBONS and
ROSENN, *Circuit Judges*.

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

Chief Judge

Attest:

Sally Mrvos, Clerk

Dated: September 15, 1983

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1412

ROBERT J. MAYLIE, JR.,

Appellant

v.

NATIONAL PASSENGER RAILROAD
CORPORATION a/k/a AMTRAK
(Civil No. 81-1964 — E.D.Pa.)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS,
GIBBONS, HUNTER, WEIS, GARTH,
HIGGINBOTHAM, SLOVITER, BECKER,
and ROSENN, *Circuit Judges*,

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Collins J. Seitz
Chief Judge

Dated: October 17, 1983

APPENDIX J

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commence; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Apr. 22, 1908, c.149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

APPENDIX K

§55. Contract, rule, regulation, or device exempting from liability; set-off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter,

shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

Apr. 22, 1908, c. 149, § 5, 35 Stat. 66.

APPENDIX L

§ 60. Penalty for suppression of voluntary information incident to accidents; separability of provisions

Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: *Provided*, That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

If any provision of this chapter is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the chapter and the applicability of such provision to other persons and circumstances shall not be affected thereby.

Apr. 22, 1908, c. 149, § 10, as added Aug. 11, 1939, c. 685, § 3, 53 Stat. 1404.

APPENDIX M

Affidavit

I, Daniel Sinisi, make the following statement.

I am an M. W. Repairman at the Bristol Shops, working for AMTRAK and have been working there since July 23, 1979. I am still working there.

I had been asked by Bob Maylie to testify at his trial since I was one of the men on the barrel when he got hurt.

I told him I did not want to get involved, that I only have five (5) years left to go on AMTRAK before I can retire and knowing the way things are in the Shops, I was very afraid to make waves.

As I said, I was the man who came over when Jimmy Warden and Bob Maylie were lifting a barrel into a dumpster. The barrel was very heavy and they couldn't get it up into the dumpster. I had to help tip it over into the dumpster because they couldn't get it all the way over.

The conditions in that area between the track and Jimmy Warden's trailer was not smooth. It has stones, ballast and areas of grease and oil. There was no defined walkway or pathway between the track and Jimmy Warden's trailer.

/s/ Daniel Sinisi
DANIEL SINISI

I, Daniel Sinisi, hereby declare that the statement which I made above is true and correct. I understand that these statements are made subject to the penalties of 18 Pa. C. S. §4904, relating to unsworn falsification to authorities.

6/16/82 Daniel T. Sinisi
Date

APPENDIX N

Affidavit

I, Robert J. Maylie, Jr., make the following statement.

Before my trial, I made attempts to see people who worked at the Bristol Shops to testify as to the conditions where I was hurt.

On several occasions, I parked my car off AMTRAK property to try to talk to men coming into work at the Shops. Work started at 7:00 A.M. and I was there before 6:30 A.M. to talk to the men about this. A number of cars stopped and I asked the men if they would come into Court to testify at trial as to conditions where I was working. They said they don't want to get involved because of the way things were at Bristol Shops, that if they testified for me there would be holy-hell for them at work, that they had to feed their families and they didn't want to lose their jobs.

One time, when I was parked out there, a car of men from the Shops stopped and when I started to talk to them a foreman, Mike "Sisco", was driving up and the men in the car said, "Here come one of the bosses. We can't be talking to you."

/s/ Robert J. Maylie, Jr.
Robert J. Maylie, Jr.

I, Robert Maylie, hereby declare that the statement which I made above is true and correct. I understand that these statements are made subject to the penalties of 18 Pa. C. S. §4904, relating to unsworn falsification to authorities.

6/16/82
Date

Robert J. Maylie, Jr.

APPENDIX O

Letter

Ernie

First complaint is — that the union representative Mike Philips is never around when you want him and that I have at least called him 20 times and have never got my phone messages returned.

Second complaint is — I am always at work between 6:15 & 6:30 A. M. I had testified at one of the workers trial that they had charged him for being late for work — and I saw him in work on time.

Ever since I have testified for this man — that Steve Scott said that everyone that testified for him — had put one foot in their grave. On February 11, 1981 I got called into the office by Steve Scott and he said to me that I was standing around doing nothing. He is a liar, because I was working.

I am not the only one that is being harassed, at least ten (10) other people are being harassed too.

Third complaint is — That Warren Goodman & Mike Cisco — who are General Foreman's are also harassing the man.

Mike Cisco does not know how to talk to the men he treats them like dirt, and uses foul language when he talks to them, and that Steve Scott knows it.

Robert J. Maylie, Jr.

APPENDIX P

Affidavit

I, Daniel Theodore Sinisi, am 58 years of age, my date of birth is January 6th, 1925. My social security number is 210-12-0733. I reside at 236 Glouster Road, Fairless Hills, Pennsylvania 19030. My home telephone number is 943-8027. I have lived here for approximately 4 years. I live here with my wife Clorrine, age 50, and my son Daniel Sinisi, Jr., age 23. Prior to this I lived at 12 East Lane, Levittown, Pennsylvania. I lived there for about 9 years. I can always be reached by calling my wife's sister Nancy Estadt at 295-6317. I'm employed by AMTRAK. I am a repairman. I repair heavy equipment for AMTRAK. I have worked there for last 4 years in the same working capacity. Prior to AMTRAK I worked for Morrisville Motors located on Bridge Street in Morrisville. I was a body and fender repairman there. I worked there for about 12 years. Prior to that I worked for Pennsylvania Railroad as a repairman and I was there for 20 years. At my present job at AMTRAK my gang foreman is Arnold Cunha. I earn about $23,000 per annum but this does vary from year to year. I have a valid Pennsylvania driver's license 05363201 and it expires January 31st, 1987. Before we start this statement I want it to be perfectly clear that [I have never been afraid to give a statement to anyone involving any accidents as long as it contains and is the truth.] Sometime during the summer of 1982, I went shopping by myself and I remembered it was a Saturday at the Roosevelt Drive-In, Flea Market. As I pulled into the Flea Market to park, I noticed a man struggling to get out of his van. I parked and went to him on foot to see if I could help him in any way. By the time I got there he was already out of his van and then I saw it was Bob Maylie, my former co-worker. He and I chatted awhile and then he told me he had items to sell there. He said that this was his only means of livelihood. The best way I can describe his physical being is that he was having some difficulty in getting around. I do not wish to comment any further on that. While talking with Bob he told me that his lawyer, a Mr. Schmuckler called him and told him he was going to reopen his accident case against AMTRAK and would I give a statement to his lawyer. I said

there was nothing I really knew in addition that I thought could help him in his case, but he insisted and kept telling me any little thing would help. I said I would give him his statement if he wanted it but I would only tell the truth. It should also be noted that prior to this time the summer of 1982 I never gave any statement to anyone nor was I ever interviewed or made any comments to either the company or Bob or his attorney or anyone. However the accident had been openly discussed by all employees at our shop and only there did I discuss it as did everyone else. After I did my shopping and left the Flea Market I had no further contact with either Bob or his lawyer. About or rather within a time frame of several weeks as I was leaving work and on the access road from my work I saw Bob stopping several cars and I then stopped too. Bob approached and asked me for my home phone number. I was reluctant to give him my number as it is unlisted. I really do not remember if I gave him my number or not but I must have because I got a phone call from Bob about a week or so after I stopped at that access road. Bob requested a meeting with his attorney and I agreed. We made arrangements to meet at the DeGrand Diner on Rt. 13 near Bath Road near the Turnpike entrance. Before I forget I remember that on the access road also stopped was Arnold Cuna, Tim, I forget his last name but he was an AMTRAK truck driver and several others of whom I forget just now. At the DeGrand Diner I met Bob and a Mr. Schmuckler Bob's lawyer. He was white male of medium height about near 50 years of age. We sat down the three of us, there was no one else present and the lawyer asked about Bob's accident and I told him what I knew. He did ask If I was ever harrassed by the company to not make any statements and I replied, "no". We then got down to the business at hand in my making a statement about Bob's accident which was hand written by Mr. Schmuckler, Esq. [Several of my statements in the statement were scratched and rewritten because I took offense as to the way it was worded.] [The third paragraph states I said I was very afraid to make waves.] I got tired of rewriting this above short statement or rather the lawyer rewriting the statement and I got disgusted and finally settled for the "wave" word signed the thing and left. [The lawyer was constantly making suggestions that I was afraid of Steve Scott my

superintendent which was positively not so.] I am not afraid of anybody. I am only afraid of making an untrue statement. To me, "that would make waves". I did sign one affidavit or statement. I do not remember signing any more than one, but I am not sure. I remember about the time frame of Bob's accident our supervisor Steve Scott gave a speech about cutting down on accidents and law suits going on. Mr. Scott would on occasion give talks of different kinds to help improve our company and so forth. He used to stand on a sort of platform that has steps leading to the lunchroom and when he was giving a speech we called it going to the steps. We would cut off the fans and shut down equipment and go to the steps and listen to Mr. Scott make his announcements. Now about the time of Bob's accident I remember a black man who had about 3 lawsuits going against the company and I would judge that is what sparked his speech. The talks was going around the shop about the black guy and his accidents. He has long since left the company and I do know his name but I'd rather not divulge it. Mr. Scott never made any comments or statements to me not to talk to anyone about any accidents. [I've never had any problems with Mr. Scott either.] I cannot afford a comment about anyone not liking Mr. Scott because in every business and always with management there is conflict. Before we get into the story itself I must admit that it was two years ago and my recall is a little fuzzy. My hours at work are always the same. I work from 7:00 a.m. until 3:30 p.m. Monday through Friday. I do not remember the day or date but in any event I arrived for work at 7:00 a.m. and I would guess somewhere around 9:00 a.m. or so I must have seen Bob and Jim Warden struggling with a trash barrel. I also want to add that the above word "struggling" is incorrect to say as I am not sure what they were doing but I am basically a helpful individual and in any event I went to help them lift the barrel. I worked as a Burro Crane repairman adjacent to the access door which leads out to the trailer which is about 65' long and was converted to an office. It is not there at this writing. I want to describe the building I worked in. It is a metal frame building high enough to house the cranes. There is a railroad track that runs completely through my building that we call the house track. The house track exits a large door that slides up and down electrically. This

house track runs through our building out the door between the office trailer and a dumpster about 40 yards or so to what we call five track I believe. To best describe our house track is to say it is not like a normal railroad track. It is more like a trolley track, that is to say it has been used so much it is flush with the ground. The ground itself between the trailer and the dumpster is plain dirt fairly level. Originally the dirt ground was ballast but over the years it has been pounded and wore down. You also have to know that the equipment we repaired is used for laying ties or cleaning ballast, or etc. So when a piece of equipment comes to us for repair I would imagine that on occasion that some ballast does drop off and to the ground there. We all on occasion police the area by removing stones or things that we think can cause an accident. There is also an occasional oil dropped by the equipment and [we normally put "oil dry" on the oil to prevent a slip and fall.] Many many people have walked over this area — the accident locus — many times over the years. Also to my knowledge I never knew of anyone suffering any injury at the above described location. As you leave my work building the office trailer is to your left and the dumpster is to your right. My building is flush with the ground or at least reasonably flush with the ground. To better describe at 10:00 a.m. a lunch truck drives up the house track and parks at the big door between the trailer and dumpster. Also the dumpster's location is altered slightly when the new dumpster is brought and the old taken they go side by side. So they are always in the same place but next to each other as they are moved. Also when they take away the full one they drag it thus causing the ground to be somewhat uneven. Now when we are to repair trucks which are around and next to main office which sits next to trailer and runs the length of my building, one could walk out and down the house track or rather between the track and the trailer as we all mostly do. Also at times we exit our building and then go to right to repair equipment around the right side of our building. To get back to the grease I would also like to explain it this way. There is grease and oil on and about the above described area but it would be like if a neighbor continually parked his truck in front of your house. It would naturally leave droppings of grease and oil, so since we have many hydraulically operated pieces of equipment it is cer-

tainly natural that there would be evidence of grease or oil. It should be reminded that oil is quickly absorbed into the ground — and the oil in question acts that way and we further help it by placing oil dry on the spots also. I want to also say that the area from exit door of my building and between Jimmy Warden's trailer and dumpster cannot be described as a walkway or pathway as in my opinion a walkway or pathway is too loose a term to completely describe. Now back to the story. I remember exiting my building and seeing Bob and Jim Warden in the process of dumping a barrel into a small portable shop dumpster which was sitting on the forks of the fork lift and then lowering the barrel back to the ground. It was then that I went to them to help assist. Now I am not exactly sure where Bob and Jim were at this writing but I would logically judge them to be at the right of the house track looking from my building and at the end of Jim Warden's trailer. My reasoning is based on the fact that when Jim left his trailer the steps do bend thereby causing one to face away from my building as he leaves the step — so if Jim were to help Bob lift the trash barrel it would be only normal for Bob to stop the fork lift at the above described location. I walked the 65' or so to the end of the trailer and helped them lift the trash barrel. The trash barrel is a regular old 55 gallon metal barrel with the top cut out. For me to define how heavy it was I simply cannot due to the fact that I am fairly strong and usually lift heavy things all day long so I cannot fairly give an opinion as to the approximate weight. [All I can say is the two men were having some difficulty lifting the barrel] and I helped. I also cannot honestly say what the contents of the barrel were because of the time lapse. The barrel normally and always sits at the end of Jim's trailer next to the steps. I also cannot recall as to how I went to their aid. I do not remember if I was called or if I simply saw them and went on my own or what. I do not even remember if the barrel was full or not. In any event all three of us did eventually empty the barrel. I also want to mention I do not remember what happened to the barrel after we emptied it. That is who took the barrel where? I remember nothing else. Also after we emptied the barrel I do not remember if Bob mentioned if he was hurt or not. What I do remember is about 15 minutes later or thereabouts someone came to me and told me Bob was hurt. I

do not remember who that someone was. I do not remember any dates to that either what I remember is that I was told Bob went into the office and made an accident statement out. This is all I know that is the end of the story. I do wish to add that before Bob's first trial I was asked by Bob if I would testify if necessary. I said yes but only tell what I know — I would only tell the truth. I would not lean to favor either Bob's side or the company's side, but [if at all possible I would not rather get involved and that is a quote.] Those were the exact words I told Bob before his trial. Only last summer as noted in above did I sign a statement as I already told and and when I sat at the Diner I was told the statement I gave them was all they needed but there was a faint possibility I would be Subpoenaed but they did say they didn't think so. I have read these 13 pages and they are true and correct.

Daniel T. Sinisi
WITNESS

Helen J. Wolf
Notary Public

The above signed statement was taken between the hours of 2:00 p.m. and 7:00 p.m. on 5 February, 1983 at 236 Gloucester Road, Fairless Hills, Pa.

I Daniel Theodore Sinisi do attest to making the above 9 page statement. I have also read the statement and I do attest to it being true and factual to the best of my knowledge and recall.

DANIEL T. SINISI
WITNESS

Sworn to and subscribed
before me this 14th day
of February 1983.

Helen J. Wolf Notary Public
My Commission Expires April 2, 1985.

COMMONWEALTH OF PENNSYLVANIA :
: SS
COUNTY OF PHILADELPHIA :

I, BRUCE REED, being duly sworn according to law, depose and say that I took the foregoing statement signed by Daniel T. Sinisi, on February 5, 1983 at 236 Gloucester Road, Fairless Hills, Pennsylvania.

BRUCE REED

Sworn to and subscribed
before me this 9th day
of February, 1983.

NOTARY PUBLIC

COMMONWEALTH OF PENNSYLVANIA :
: SS
COUNTY OF PHILADELPHIA :

I, DANIEL T. SINISI, being duly sworn according to law, depose and say that the foregoing statement is true and factual to the best of my knowledge, information and belief and that I made said statement in good faith.

DANIEL T. SINISI

Sworn to and subscribed
before me this 14th day
of February , 1983.

NOTARY PUBLIC

My Commission Expires April 2, 1985.

APPENDIX Q

Form Letter

Robert Maylie Jr.
12441 Balston Rd.
Philadelphia. PA.

Dear Mr. Maylie:

Your personal injury record since your hiring date has been less than satisfactory. To date, our records show that your have had two injuries. Our main concern is to send our employees home in the same physical condition as when they arrived for duty. Safety is of the utmost in the discharge of duty, and it is something that cannot be ignored, even for a moment.

Be advised that any further personal injuries resulting from unsafe working practices on your part will result in disciplinary action.

M. Scott
Division Engineer